IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.5964 OF 2006

Piaggio Vehicles Pvt. Ltd.)
having its office at 102,)
Phoenix, Bund Garden Road,)
Pune - 411 001.).. Petitioner.

V/s.

1. Deputy Commissioner of)
Income Tax, Circle 4, Pune)
having his office at 'B' Wing)
Room No.212, 2nd Floor,)
PMT Building, Commercial)
Complex, Pune 411 004.)

2. The Union of India,)
through Commissioner of)
Income tax (Judicial),)
Aayakar Bhavan, M.K. Road,)
Mumbai - 400 020.).. Respondents.

Ms.A. Vissanji with Mr.S.J. Mehta for the petitioner.

Mr.A.M. Kotangale for the respondents.

CORAM : DR.S. RADHAKRISHNAN &
J.P. DEVADHAR, JJ.

DATED : 6TH FEBRUARY, 2007.

ORAL JUDGMENT : (Per J.P. Devadhar, J.)

1. Rule. Rule is made returnable forthwith. By consent of the parties, the Writ Petition taken up for final hearing.

2. This petition is filed to challenge the

notice dated 26th October, 2005 issued under Section 148 of the Income Tax Act, 1961 (for short 'the Act') and also the order dated 28th July, 2006 passed by the Assessing Officer rejecting the objections raised by the petitioner for reopening of the assessment for AY 1999-2000.

3. The petitioner is engaged in the business of manufacture and sale of three wheelers and components thereof. On 30th March, 1998, the petitioner entered into an agreement with Greaves Limited for purchase of Baramati Unit on 'as is where is basis' as a going concern free from all encumbrances with effect from and including the Transfer Date (31st March, 1998) for a total consideration of Rs.23,70,00,000/- plus goodwill amounting to Rs.4,30,00,000/-.

4. For the year ended 31st March, 1999 relevant to AY 1999-2000, the assessee filed its return of income claiming depreciation on the goodwill claiming it to have been acquired and put to use during the year in question. In the note annexed to the statement of income from business, it was stated thus :

> "4) Since the Net Working Capital and the dealership network was acquired from Greaves Limited on April

> 1, 1998 the Company states that Goodwill, being inextricably linked to the business operations which in turn is linked to the acquisition of the Net Working Capital and the dealership network, was also effectively acquired on April 1, 1998 and put to use from that date."

5. During the assessment proceedings, the assessing officer called upon the petitioner to furnish the particulars regarding goodwill acquired by the petitioner. The petitioner informed the Assessing officer that stamp duty on transfer of goodwill amounting to Rs.21,50,000/- was paid on 1st April, 1998 and that the goodwill was effectively transferred on 25th June, 1998 and used in the full year after 25th June, 1998 and, therefore, depreciation at the rate of @ 25% thereon is allowable as per Section 32(1)(ii) and Explanation 3 thereof.

6. Accordingly, in the assessment order passed on 18th March, 2002 under Section 143(3) of the Act depreciation on goodwill @25% was allowed.

7. Thereafter, by the impugned notice dated 26th October, 2005 issued under Section 148 of the Act, the assessing officer sought to reopen the assessment for AY 1999-2000 by recording reasons, which read thus :

" For A.Y. 1999-2000 assessee has claimed depreciation on Goodwill of Rs.1,12,87,600/-. Assessment order u/s. 143(3) was completed on 18/3/2002 by DCIT, Circle (2), Pune. Depreciation on Goodwill is not an allowable Deduction u/s.32(1)(ii) of I.T. Act. As per Sec.32(1)(ii) "Know How, Patents, Copy Rights, Trade Marks, Licenses, Franchises or any other Business or commercial Rights of similar nature, being intangible Assets acquired on or after the 1st day of April, 1998". As can be seen from the wordings of the sec.32(1)(iii) the section specifically allows depreciation on certain intangible assets like Know How, Patents, Copy Rights, Trade marks, Licenses, Franchises or any other Business or Commercial rights of similar nature.

The word ‘Any other Business or Commercial Rights or similar nature’ has to be interpreted in connection with earlier words i.e. Know How, Patents, Copy Rights, Trade Marks, Licenses, Franchises. The word ‘Know How’ as defined in explanation 4 to subsection 1 of the sec.32(1) of the Act, which means "any Industrial Information of technique likely to assist in the manufacture or processing of goods or in he working of mine, oil well or other sources of mineral deposits including searching for discovery of testing or deposits". The word "Patent" has not been defined in the Act, however dictionary meaning of the word is "Exclusive privilege granted by the Souvenir to the first inventor or a new manufacture or new invention". The word "Copyright" is defined as "Exclusive rights given by Law for a certain term of year to an author, composer to print, publish and sell copies of his original work". The dictionary meaning of the word "Trademark" is "The mark used by a manufacturer or Trader to distinguish his goods". Dictionary meaning of word "Franchises" is "A license from the owner of a Trademark of Trade name permitting another to sell a product or

> service under that name". In sec. 32(1)(ii) of the Act it speaks of "Any other business or commercial rights of similar nature". The meaning of "any other business or commercial rights of similar nature". The meaning of "any other business or commercial rights of similar nature" has to be understood in context with the words "Know How, Patents, Copyright, Trade marks, Licenses, Franchises".
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> Without prejudice to above discussion, as per sec. 32(1)(ii) depreciation on Intangible assets acquired on or after 1st day of April, 1998 is to be allowed. On perusal of the agreement submitted by the assessee it was observed that the said agreement was dated 30.3.1998, therefore even if Goodwill to treated as on Intangible assets following in the purview of sec. 32(1)(ii), then it was acquired on 30.3.1998 and hence depreciation on Goodwill is not allowable.
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> As discussed above, the word Goodwill doesn't come in the purview of Know How, Patents, copy Rights, Trade Marks, Licenses, Franchises. Therefore, Goodwill is not an intangible asset as per sec. 32(1)(ii). Therefore, Depreciation on Goodwill is not allowable as per sec. 32(1). Therefore, I am of the opinion that Assessee's claim of Depreciation on Goodwill of Rs.1,12,87,500/- is not an allowable deduction. Therefore, I am of the opinion that income escaped Assessment. In the Assessee's case for A.Y. 1999-2000."

8. The assessee objected to the reopening of the assessment, however, the same was rejected by the assessing officer by his order dated 28th July, 2006. Hence, this petition.

9. Ms.Vissanji, learned counsel appearing

on behalf of the petitioner submitted that the notice dated 26th October, 2005 issued under Section 148 of the Act beyond four years from the end of the AY 1999-2000 cannot be sustained because :

(a) The petitioner had disclosed all the relevant material in respect of its claim for depreciation on intangible assets including ‘goodwill’. In the course of assessment proceedings, agreements dated 30th March, 1998 were produced and on a query raised, it was pointed out that stamp duty on goodwill was paid on 1st April, 1998 and the goodwill was effectively transferred on 25th June, 1998. Thus, all material facts were disclosed and, therefore, in the absence of any failure on the part of the petitioners to disclose fully and truly all material facts, reopening of the assessment beyond four years from the end of the relevant assessment year is without jurisdiction and cannot be sustained.

(b) In the assessment order passed under Section 143(3) of the Act, the assessing

officer had considered the claim of the petitioner on intangible assets and disallowed claim for depreciation on lease hold rights and allowed depreciation on goodwill. Thus, there was a conscious application of mind and definite decision arrived at to allow depreciation on goodwill after fully satisfying that the goodwill was acquired after 1st April, 1998 and that depreciation was allowable on goodwill under Section 32 of the Act. Therefore, reasons recorded for reopening the assessment that depreciation is not allowable on goodwill is only a change of opinion and, therefore, the reopening of the assessment based on mere change of opinion cannot be sustained.

(c) in the reasons recorded for reopening the assessment it is not even alleged that the assessee has failed to disclose fully and truly all material facts which is a condition precedent for reopening the assessment beyond four years from the end of the relevant assessment year and, therefore, the impugned notice

issued beyond four years is liable to be quashed and set aside.

(d) The assessing officer had no material, information or evidence to show or reason to believe that the claim for depreciation on 'goodwill' is improper and/or excessive. The assessment order was passed after scrutinising the annual accounts, audit report in form 3CA, computation of income, letters dated 21st January, 2002, note dated 28th February, 2002 and after considering all the material facts relating to the acquisition of goodwill after 1st April, 1998. Both the preconditions required for reopening the assessment beyond four years for the end of the relevant assessment year, namely, failure to disclose fully and truly all material facts and reason to believe that income has escaped assessment are absent in the present case and, therefore, the impugned notice is liable to be quashed and set aside.

10. Relying upon the judgment of the Apex

Court in the case of Alapati Venkataramiah V/s. Commissioner of Income-Tax, Hyderabad reported in 57 ITR 185 and decision of this Court in the case of Evans Fraser and Co. Ltd. (in liquidation) V/s. Commissioner of Income-Tax, Bombay City-II reported in 137 ITR 493, the learned counsel for the petitioner submitted that the fact that the petitioner had entered into an agreement to acquire goodwill on 30th March, 1998 cannot be a ground to deny depreciation, especially when the assessing officer after due verification had arrived at a conclusion that though the agreement is dated 30th March, 1998 the goodwill was actually acquired after 1st April, 1998. Accordingly, it is submitted that the impugned notice issued without jurisdiction be quashed and set aside.

11. Though the arguments advanced on behalf of the petitioner appears to be attractive, in the facts of the present case, we find it difficult to accept the same.

12. Depreciation on intangible assets became available under Section 32 of the Act only if the intangible assets were acquired after 1st April, 1998. In other words, depreciation is not allowable where the intangible assets are acquired prior to

1st April, 1998.

13. In the present case, though the goodwill was acquired under the agreement dated 30th March, 1998, in the return of income the petitioner claimed that the goodwill was effectively acquired on 1st April, 1998. During the assessment proceedings, the assessing officer by a letter dated 5th December, 2001 had called upon the petitioner to furnish details of Rs.4.29 crores shown as goodwill in the books. The petitioner informed the assessing officer that the stamp duty on transfer of goodwill was paid on 1st April, 1998 and that the goodwill was effectively transferred on 25th June, 1998. Accordingly, depreciation on goodwill was allowed on the footing that the same was acquired on or after 1st April, 1998.

14. However, from the agreement dated 30th March, 1998, it is seen that the petitioner had agreed to purchase Baramati unit as a going concern on as is where is basis for Rs.23 crores plus goodwill amounting to Rs.4.30 crores with effect from the specified transfer date, that is from 31st March, 1998. It is recorded in the agreement that if any of the conditions precedent are not fulfilled, the transfer date shall be shifted to

30th April, 1998. It is not known as to whether the transfer date was shifted to 30th April, 1998 on account of non-fulfilment of the conditions precedent set out in the agreement. In any event, in the Tax Audit Report relating to financial year 1st April, 1998 to 31st March, 1999 (AY 1999-2000), the goodwill at Rs.4.30 crores is shown in the opening block of fixed assets, which obviously means that the goodwill was acquired prior to 1st April, 1998 and accordingly in the tax audit report for AY 1999-2000, no depreciation is claimed on the goodwill. Thus, there were mutual contradictions in the Tax Audit Report and the return of income filed by the petitioner regarding the date of acquisition of the goodwill. In these circumstances, we find it difficult to accept the contention that the petitioner had made full and true disclosure of material facts.

15. The argument that the assessing officer had taken a conscious decision to grant depreciation after accepting the contention of the petitioner that the goodwill was acquired after 1st April, 1998 cannot be accepted because, in his letter there is no reference to the inconsistencies in the tax audit report and the return of the income regarding the date of acquisition of the goodwill. Even the

assessee in its reply had not explained the said discrepancy. Moreover, there is no discussion whatsoever in the assessment order regarding the discrepancy in the deed of acquisition of the goodwill. As noted earlier, in the Tax Audit Report, it is shown that the goodwill at Rs.4.30 crores was acquired prior to 1st April, 1998, whereas in the return of income it was claimed that the goodwill was acquired on or after 1st April, 1998. In view of this apparent contradiction in the material facts, it is difficult to held that in the assessment order passed under Section 143(3) of the Act, a conscious decision was taken to the effect that the goodwill was acquired after 1st April, 1998.

16. The ratio laid down by the Apex Court in the case of Alapati Venkatramiah (supra) does not support the case of the petitioner. In that case, it was held that the goodwill is an intangible asset and ordinarily passes along with transference of while business. In the present case, whether the goodwill is an intangible asset is not the issue. In the present case, the issue is whether there was full and true disclosure of material facts. The decision of this Court in the case of Evans Fraser & Co. Limited (Supra) has no relevance to the facts

of the present case. In that case, after considering the material on record, it was held that the transfer of business took place after 1st April, 1948. As stated earlier in the absence of any finding recorded by the assessing officer to the effect that inspite of the fact that the Tax Audit Report shows that the goodwill was acquired prior to 1st April, 1998, in the facts of the present case the goodwill must be held to be acquired after 1st April, 1998, it is difficult to held that a conscious decision was taken in the matter by the assessing officer. In our opinion mutual inconsistencies in the tax audit report and the return of income which were not noticed by the assessing officer at the time of assessment under Section 143(3) of the Act is sufficient reason to reopen the assessment.

17. In this view of the matter, reopening of the assessment proceedings for AY 1999-2000 initiated by the assessing officer cannot be faulted.

18. Accordingly, the petition fails. Rule is discharged with no order as to costs.

(DR.S. RADHAKRISHNAN, J.)

(J.P. DEVADHAR, J.)